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NOTES.

THE WEBB-KENYON ACT UPHELD.—The Webb-Kenyon Act[1] is the first attempt of Congress to permit the states to make regulations governing the interstate transportation of any goods.[2] It can hardly be

[1]37 Stat. 699 (1913), entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," and prohibiting the interstate transportation of liquors when intended to be "received, possessed, sold, or in any manner used" in violation of the state law. No penalty for violation is provided.

[2]The Wilson Act, 26 Stat. 313 (1890), did not affect interstate transportation in its strict sense, as it was not applicable till after the receipt of the liquor. It placed within the scope of the states' jurisdiction the sale of liquors in the original package acquired by interstate transportation, which, as a use of property lawfully acquired, was an incident of such commerce and therefore within the control of Congress. Rhodes *v.* Iowa (1898) 170 U. S. 412, 426, 18 Sup. Ct. 664; Vance *v.* Vandercook Co. (1898) 170 U. S. 438, 445, 18 Sup. Ct. 674; see Leisy *v.* Hardin (1890) 135 U. S. 100, 110, 10 Sup. Ct. 681. Since the jurisdiction of Congress over the incidents of commerce is founded on the necessity of that jurisdiction

disputed that the purpose of this Act—to enable the states to enforce their proper police regulations of the use of liquors by preventing interstate shipments from practically annulling their effectiveness—is highly proper and desirable. As to the constitutionality of the means employed, there is more doubt. If the Act penalized of its own force interstate shipment of liquors for purposes prohibited by the states, so that actions might be brought under it in the federal courts, it might well be sustained as a prohibitory regulation of commerce.[3] But the Webb-Kenyon Act is really effective only as submitting interstate transportation of liquors to such prohibitions as the states may enact, and thus it makes the state regulations the vital laws upon the subject. Since Congress cannot delegate to the states any of the power granted to it by the Constitution,[4] such an act can seemingly be supported only if the grant to Congress superseded but did not extinguish the inherent police power of the states over this subject. This view is supported by the recognized right of the states to continue to exercise power over interstate commerce so long as such acts are compatible with the Congressional power.[5] There are two circumstances which bar this concurrent action by the states: first, when Congress has exercised its power on the point in question, and second, when the nature of the subject is national in its scope and demands a uniform regulation which only Congress can exercise. Over the latter group of subjects, it is said, Congress has exclusive control, and the failure of Congress to act on any point must be construed as expressing a determination that there shall be no regulation.[6] If the silence of Congress can be considered as a positive ruling, the real limitation on the power of the states is the declaration of Congress on the subject, whether expressed,

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to execute properly the express grant of commerce regulation, see Gibbons *v.* Ogden (1824) 22 U. S. 1; *cf.* McCulloch *v.* Maryland (1819) 17 U. S. 316, and since the existence of such necessity is a question of legislative discretion, see McCulloch *v.* Maryland, *supra,* Congress might well declare jurisdiction over this incident not essential, and permit the states to regulate it. But a different question is presented when it is attempted to give the states a regulative power over the transportation itself, which is expressly intrusted to Congress by the Constitution.

[3]*Cf.* Lottery Case (1903) 188 U. S. 321, 23 Sup. Ct. 321; Hoke *v.* United States (1913) 227 U. S. 308, 33 Sup. Ct. 281.

[4]Cooley, Constitutional Limitations (7th ed.) 163; see Cooley *v.* Port Wardens of Philadelphia (1851) 53 U. S. 299, 318; *In re* Rahrer (1891) 140 U. S. 545, 560, 11 Sup. Ct. 865. A legislature may delegate such *quasi*-judicial functions as the determination of the conditions to which the statute shall apply. Union Bridge Co. *v.* United States (1907) 204 U. S. 364, 27 Sup. Ct. 367. This is the basis of the authority of the interstate commerce commission, see 1 Drinker, Interstate Commerce Act, § 273; Judson, Interstate Commerce (3rd ed.) § 59; Kentucky etc. Bridge Co. *v.* Louisville etc. Ry. (C. C. 1889) 37 Fed. 567, and similar bodies, and might be extended by analogy to the determination by the states of the conditions to which the Webb-Kenyon Act applies so far as making the Act effective thereto. But the further enactment by the state of its own regulations, being a strictly legislative function, cannot be brought within the analogy suggested, and the general rule that legislative power cannot be delegated must govern.

[5]Cooley *v.* Port Wardens of Philadelphia, *supra*; see Bowman *v.* Chicago etc. Ry. (1888) 125 U. S. 465, 507, 8 Sup. Ct. 689; Reid *v.* Colorado (1902) 187 U. S. 137, 148, 23 Sup. Ct. 92.

[6]Bowman *v.* Chicago etc. Ry., *supra,* 508; Robbins *v.* Shelby Taxing Dist. (1887) 120 U. S. 489, 493, 7 Sup. Ct. 592.

or implied from its silence. Where Congress affirmatively acts, the federal legislation supersedes and bars the enforcement of state legislation, but does not annul it. Nor does it extinguish the power of the state, though temporarily forbidding its exercise. On the repeal of the federal act, the state statute is again enforcible, and the power of the state over the subject revives.[7] It apparently follows that when there is no positive regulation by Congress on a subject within its exclusive control, and when Congress further declares that the states may act, thus rebutting the presumption that it desires that the subject be free from regulation, the inherent power of the state is unfettered and attaches to that subject.[8] This view undoubtedly involves the discarding of some previous dicta that the grant to Congress extinguished the power of the states in this field,[9] and that continuity of interstate shipments is protected by the Constitution from the operation of state law,[10] but it is probably more in accord with the intent of the framers of the Constitution,[11] and since Congress retains the discretion whether or not to permit the states to exercise any power, it in no way detracts from the plenary control of Congress.

The United States Supreme Court in its recent decision in *Clark Distilling Co.* v. *Western Maryland Ry.* (Oct. Term, 1916, Nos. 75 & 76, decided Jan. 8, 1917)[12] upholds the constitutionality of the Webb-Kenyon Act, retaining nevertheless the proposition that the states have no power to regulate interstate transportation, but that the sole and exclusive power is in Congress. The Court is forced, therefore, in order to deny that the Act delegates power to the states, to distinguish between delegation of power to regulate, and permission to make regulations which are applicable by the will of Congress. There seems to be no real difference. In either case the fact remains that the state may act where before it could not, and in either case this power exists by the will of Congress and subject to revocation by Congress. The implication of the Court that the Act regulates commerce by declaring when the transportation of liquors shall not be lawful commerce, and that the resulting increase in the jurisdiction of the states is merely an accidental consequence, is equally difficult to accept. To determine what is and what is not interstate commerce is to construe the use of that term in the Constitution, and the Court has always deemed this its own prerogative.[13] It also seems fundamental that if Congress

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[7]Tua *v.* Carriere (1886) 117 U. S. 201, 6 Sup. Ct. 565; see Sturges *v.* Crowninshield (1819) 17 U. S. 122; *cf. In re* Nelson (D. C. 1895) 69 Fed. 712.

[8]Dicta in Leisy *v.* Hardin, *supra,* 108, 109, 119, 123, 124, suggest this view. The present is the first time the question has fairly arisen.

[9]See *In re* Rahrer, *supra,* 561.

[10]See Bowman *v.* Chicago etc. Ry., *supra*; Rhodes *v.* Iowa, *supra,* 419.

[11]See The Federalist, No. 32; Cooley *v.* Port Wardens of Philadelphia, *supra.*

[12]The two cases decided under this title arose on applications for mandatory injunctions to compel the defendant railway to transport from Maryland into West Virginia shipments of liquor for personal use. A West Virginia statute, W. Va. Code (1913) c. 32A, amended by W. Va. Acts (1916) c. 7, prohibited interstate and intrastate transportation of liquors for any purpose, and also the receipt of liquors so transported, but did not prohibit personal use of liquors. The West Virginia statute was upheld as within the authority of the state under the Webb-Kenyon Act.

[13]1 Story, Constitutional Law (5th ed.) § 375.

cannot enlarge the powers of the state by directly delegating power, it cannot do so indirectly. But whatever may be the grounds for the decision, the case stands for the proposition that Congress may in its discretion permit the states to exercise their police power on subjects affecting other states.

The broad construction of the Webb-Kenyon Act given by the Court[14] necessarily follows from this view of its constitutionality. Admitting the enlargement of the states' jurisdiction, the view that the Act referred only to the receipt, possession, sale, or use of liquor in violation of a state law valid under the usual powers of the state and regardless of any increased jurisdiction resulting from the Act[15] is no longer tenable. Under that view, as regulation of the receipt was an interference with interstate commerce and therefore invalid, the state could not regulate interstate shipments for personal use without prohibiting that use, and the Act was thus stripped of much of its intended effect. Under the present construction, the states' power to enforce their prohibition laws is as complete against inter- as against intrastate transportation.

THE KRONPRINZESSIN CECILIE.—In the recent case of *The Kronprinzessin Cecilie* (1 C. C. A. 1916) 56 N. Y. L. J. 915, the claimant's steamship was sued for the non-performance of its contract to deliver shipments of gold at Plymouth and Cherbourg. The vessel sailed from New York on July 27th, 1914. On July 31st, when about 1000 miles from Plymouth, the master received a message from the directors that war had broken out between Germany and England, France and Russia, requiring the ship to return to New York. War had not been declared between those countries, and it was shown that if the ship had continued at its usual rate of speed, it would have cleared from Plymouth about 48 hours and from Cherbourg about 11 hours before they became hostile ports. On the defense of "restraint of princes" being raised, the court held that an actual and operative restraint was necessary and, as there was none in this case, the carrier was not excused from its obligation to deliver the specie. Putnam, J., dissented on the ground that the act of putting back to America was a reasonable exercise of the master's discretion.

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[14]The court holds that under the Act the states have authority, as an incident to their undisputed right to forbid the manufacture and sale of liquors, to restrict the means by which such intoxicants can be obtained for personal use, even if such use is permitted.

[15]See Van Winkle *v.* State (1914) 27 Del. 578, 91 Atl. 385; Brewing Co. *v.* Chicago etc. Ry. (D. C. 1913) 215 Fed. 672; *Ex parte* Peede (Tex. Crim. App. 1914) 170 S. W. 749; Palmer *v.* Southern Exp. Co. (1914) 129 Tenn. 116, 165 S. W. 236; Brennen *v.* Southern Exp. Co. (S. C. 1916) 90 S. E. 402; 16 Columbia Law Rev. 1. The case of Adams Exp. Co. *v.* Kentucky (1915) 238 U. S. 190, 35 Sup. Ct. 824, affirming s. c. 154 Ky. 462, 157 S. W. 908, holding under facts nearly analogous to those in the present case that the Webb-Kenyon Act was not applicable, is distinguished by the Court on the ground that the Kentucky court had decided that the state statute did not apply to interstate commerce and therefore that there was no violation of a state law intended. But the decision of the Kentucky court was founded on the belief that the Webb-Kenyon Act did not warrant state regulation of interstate shipments for a permissible use. Under the correct interpretation of the Act, a contrary holding would have resulted.